



OFFICE of *the* ATTORNEY GENERAL  
GREG ABBOTT

October 13, 2003

Ms. Joanne Wright  
Associate General Counsel  
Texas Department of Transportation  
125 East 11<sup>th</sup> Street  
Austin, Texas 78701-2483

OR2003-7245

Dear Ms. Wright:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 189230.

The Texas Department of Transportation (the "department") received a request for all information concerning a specific investigation. You claim that some of the requested information is excepted from disclosure under sections 552.101 and 552.116 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

First, we address your argument that a portion of the submitted information is confidential pursuant to Title I of the Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. §§ 12101 *et seq.*, and is therefore excepted from disclosure under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. The ADA provides that information about the medical conditions and medical histories of applicants or employees must be 1) collected and maintained on separate forms, 2) kept in separate medical files, and 3) treated as a confidential medical record. In addition, information obtained in the course of a "fitness for duty examination," conducted to determine whether an employee is still able to perform the essential functions of his job, is to be treated as a confidential medical record. 29 C.F.R. § 1630.14(c). *See also* Open Records Decision No. 641 (1996). The Equal Employment

Opportunity Commission (the "EEOC") has determined that medical information for the purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). We agree that the department must withhold under section 552.101 the information you have marked as confidential under the ADA .

We next note that a portion of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides in part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

....

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

(15) information regarded as open to the public under an agency's policies[.]

Gov't Code § 552.022(a)(1). You have submitted a document that appears to constitute a completed report pertaining to the matter at issue, which was labeled "release" when submitted to this office. We assume you have released this document, which we have marked, to the requestor.<sup>1</sup> In addition, the documents submitted as Exhibit B contain information that is subject to sections 552.022(a)(3) and 552.022(a)(15). As provided by section 552.022(a), this information is public unless it is made confidential under other law. You claim that this information is excepted from disclosure under section 552.116. Section 552.116 is a discretionary exception that does not constitute other law for purposes of section

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<sup>1</sup>We note that this document is not part of Exhibit B, which contains the information you seek to withhold.

552.022.<sup>2</sup> Therefore, the department may not withhold any of the information that is subject to section 552.022 under section 552.116. This information, which we have marked, must be released.

We now address your claim under section 552.116 for the remaining information in Exhibit B. You argue that this information is excepted under section 552.116 of the Government Code. Section 552.116 provides as follows:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency or institution of higher education as defined by Section 61.003, Education Code, is excepted from [public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] by this section.

(b) In this section:

(1) 'Audit' means an audit authorized or required by a statute of this state or the United States and includes an investigation.

(2) 'Audit working paper' includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You inform this office that the remaining information submitted as Exhibit B relates to an audit authorized by state law and performed by an internal auditor of the department. *See* Gov't Code §§ 321.0134, 2102.007. You state that the auditor compiled this information during the course of a formal audit. Based on your representations, we conclude that the remaining information in Exhibit B constitutes audit working papers under section 552.116(b)(2) of the Government Code and therefore, with the exception of the information subject to section 552.022, is excepted from disclosure in its entirety under section 552.116.

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<sup>2</sup>Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding), 549 at 6 (1990). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

To summarize, the department must withhold the information it has marked under section 552.101 in conjunction with the ADA. The department must release the document we have marked pursuant to sections 552.022(a)(3) and 552.022(a)(15). The remaining submitted information may be withheld under section 552.116.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael A. Pearle". The signature is fluid and cursive, with the first name "Michael" being the most prominent part.

Michael A. Pearle  
Assistant Attorney General  
Open Records Division

MAP/jh

Ref: ID# 189230

Enc. Submitted documents

c: Mr. John Corny  
110 Overlook Ct.  
Troy, Texas 76579  
(w/o enclosures)